



Litigation Update

Litigation Section News

January 2007

Intention to end marriage need not be announced to the world.

Sam and Maureen agreed to separate after a lengthy marriage. But they did not want their children to know until after the holidays, so they did not tell anyone. Several months after their agreement to separate, they announced the event. The date of separation affected the evaluation of community property assets and Sam argued that the separation was not effective until it was announced. The trial court agreed with him. The Court of Appeal did not. It held that the date of separation is the day that at least one of the parties to the marriage intends to end the marital relationship and there is objective evidence of this intent. *IRMO Manfer* (Cal. App. Fourth Dist., Div. 3; November 9, 2006) 144 Cal.App.4th 925; [50 Cal.Rptr.3d 785, 2006 DJDAR 14891].

Those are fighting words.

The Virginia Supreme Court has unanimously held that an insurance adjuster's derogatory comments about a lawyer to that lawyer's client can form the basis of

a defamation claim. At issue were comments made by an insurance adjuster to an accident victim. The adjuster made statements that the lawyer just took people's money and that the client would receive more money for his claims if he had not hired the lawyer and dealt with the adjuster directly. *Tronfeld v. Nationwide Mutual Insurance Co.*, (November 3, 2006) 272 Va. 709; [636 S.E.2d 447].

Motion for sanctions may survive final judgment.

Code Civ. Proc. §128.7 provides for a 21-day "safe harbor" period between the time of service and the time of filing of a motion for sanctions. During this period the party upon whom the motion is served may avoid the potential for sanctions by dismissing the particular pleading or motion at issue. In *Day v. Collingwood* (Cal. App. Fourth Dist., Div. 1; November 16, 2006) 144 Cal.App.4th 1116; [50 Cal.Rptr.3d 903, 2006 DJDAR 15110], summary judgment was entered before the motion was filed. The Court of Appeal held that the trial court retained jurisdiction to rule on the motion for sanctions.

Internet service providers and users not liable for defamation.

The *Communications Decency Act of 1996* (47 U.S.C. § 230 ff.) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The California Supreme Court, following the lead of the federal courts and several other state courts, interpreted this provision as providing immunity against liability for defamation for persons who republished statements in internet postings and e-mails. This immunity exists even when the republishers have knowledge of the

falsity of the statements. *Barrett v. Rosenthal* (Cal.Supr.Ct.; November 20, 2006) 40 Cal.4th 33; [2006 DJDAR 15188].

Note: The same rule *does not* apply to newspapers and book sellers. Under the common law, these may be liable if they published the defamatory statement, knowing it was false.

Spouse may use community assets to support needy parent.

Fam. Code §4400 imposes a duty on an adult child "to the extent of his or her ability, [to] support a parent who is in need and unable to maintain himself or herself by work." This means that a spouse may use community property to support a needy parent. In so

Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with.

Go to:

<http://members.calbar.ca.gov/discuss> to explore the new bulletin board feature—just another benefit of Litigation Section membership.

Remember to first fill out the Member Profile to get to the Discussion Board!

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, [click here](#).

holding, in *IRMO Leni* (Cal. App. Third Dist.; November 15, 2006) 144 Cal.App.4th 1087; [50 Cal.Rptr.3d 886, 2006 DJDAR 15076], noted that the failure to support a needy parent is a misdemeanor (*Pen. Code* §270c). The court also recognized that few seem to be aware of this requirement.

Workers Compensation death benefit to estate is unconstitutional. *Lab. Code* § 4702(a)(6)(B) provides that when an employee suffers a fatal injury while at work, and leaves no dependents, the estate of the decedent is entitled to receive a death benefit of \$250,000. *Art. XIV, Section 4* of the California Constitution authorizes the Legislature to create a liability for employers to compensate their injured workers and the workers' dependents for resulting death. The Constitution does not authorize payments to the workers' estates where there are no dependents. Therefore, the portion of the statute authorizing payments to the estate of a worker who has no dependents violates the California Constitution. (*Six Flags, Inc. v. WCAB* (Cal. App. Second Dist., Div. 3; November 27, 2006) 145 Cal.App.4th 91; [2006 DJDAR 15485].

Attorney fee award after denial of anti-SLAPP motion is not immediately appealable. In general, an order granting or denying an anti-SLAPP motion (*Code*

Civ. Proc. §425.16 ff.) is immediately appealable. But an order awarding attorney fees to a plaintiff who successfully opposes such a motion is not; an appeal from such an order may be included in an appeal from the final judgment. *Doe v. Luster* (Cal. App. Second Dist., Div. 7; November 28, 2006) 145 Cal.App.4th 139; [2006 DJDAR 15519].

Jurors may take notes. The Judicial Council announced that it adopted various jury reforms, including a rule that judges must allow jurors to take notes. It came as a surprise to many that some judges prohibited this practice. They can no longer do so.

Attorneys' employers must indemnify them for cost of defending malpractice suit. A lawyer was sued for legal malpractice, based on services performed for plaintiff while the lawyer was employed by a law firm. Under *Lab. Code*, § 2802 an employer must indemnify an employee for costs incurred in defending a third-party lawsuit. Therefore the law firm was under a duty to indemnify him for his legal expenses in defending the malpractice suit. *Cassady v. Morgan, Lewis & Bockius LLP* (Cal. App. Second Dist., Div. 3; November 29, 2006; *as Mod.* December 21, 2006) 145 Cal.App.4th 220; [2006 DJDAR 15585].

The Litigation Section of the California State Bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, [click here](http://www.surveyconsole.com/console/takesurvey?id=195323) or paste this web address into your web-browser: <http://www.surveyconsole.com/console/takesurvey?id=195323>

Your participation is important and greatly appreciated.

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